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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 627

VINCENT D. TODISCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. II,[1] Pet. App. 1–8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1961 (R. II, Pet. App. 9). A petition for rehearing was denied on November 29, 1961 (R. II, Pet. App. 10). The petition for a writ of certiorari was filed on December 22, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Unless otherwise specified, record references are to Volumes III *et seq.* of the transcript of trial proceedings.

QUESTION PRESENTED

Whether petitioner's conversations with a federal agent, which were held in petitioner's office to which the agent had been invited and which were transmitted by a concealed radio on the person of the agent and recorded at the receiving point, were admissible at trial to show the attempted bribery of the agent.

STATUTES INVOLVED

Section 301 of the Federal Communications Act (48 Stat. 1081, 47 U.S.C. 301) provides in part:

> License for Radio Communication or Transmission of Energy
>
> It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Section 318 of the Federal Communications Act (48 Stat. 1089, as amended, 47 U.S.C. 318) provides in part:

> Operation of Transmitting Apparatus
>
> The actual operation of all transmitting apparatus in any radio station for which a sta-

> tion license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission * * *.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of attempting to bribe a federal internal revenue agent, in violation of 18 U.S.C. 201 (R. I, 29). He was sentenced to imprisonment for 1 year and 1 day—the service of the sentence to be suspended—and to pay a fine of $500 (R. I, 30). The court of appeals affirmed (R. II).

The evidence at the trial is not disputed here. At the time of the crime, petitioner, a practicing attorney, was negotiating with an internal revenue agent, Oto, to reach a compromise settlement of a client's tax liability (R. 14–39, 313–322, 188–189). Because petitioner had made certain overtures to Oto suggesting a reward for his help, the agent, on subsequent visits to petitioner's office, concealed underneath his tie a small miniature radio transmitter (R. 24–34, 43–52). His conversations with petitioner were transmitted outside to other agents and recorded at the receiving point (R. 43, 50). The resulting tapes constituted the government's proof of the attempted bribery (R. 103–171, 378 *et seq.*).

ARGUMENT

Petitioner's contention, that the radio-transmitted evidence of his propositions made in his law office to an internal revenue agent was constitutionally inadmissible at trial, is answered in full by *On Lee* v. *United States*, 343 U.S. 747. In that case the defendant's incriminating statements made in his place of business to an undercover agent were transmitted, as here, by a radio concealed on the person of the agent to another agent listening outside. In holding that the testimony of the listening agent was admissible at trial, this Court rejected contentions that the conduct of the agents amounted to an unlawful search and seizure as proscribed by the Fourth Amendment, or to trespass, or to a violation of the Federal Communications Act. The facts and the reasoning of that case are dispositive of the issues here.

1. Petitioner, in an attempt to distinguish *On Lee*, lists differences which are irrelevant. He characterizes the laundry in *On Lee* (the place of conversation) as a "place to which the public was invited generally" and the law office in the instant case as a "private law office"; and he describes *On Lee* and the undercover agent as "old acquaintance[s]" and petitioner and agent Oto as "mere business acquaintances" (Pet. 15–16). But these differences are matters going only to the question of trespass. In the present case, the evidence indicates that agent Oto was in petitioner's office by express invitation. The record is replete with references to occasions, in addition to the day of the crime, on which petitioner called the agent to ask that he come to his office (R. 152, 164, 175, 176; see

petitioner's testimony, R. 316, 347, 351). Even if, as petitioner asserts (Pet. 16), agent Oto did "affirmatively" falsify his reason for coming, this factor would be of no importance to the outcome of the present case. This court in *On Lee* rejected the fine-spun doctrine of trespass *ab initio* because of entry obtained by fraud. The Court said that, only in the case of physical entry by force, or by unwilling submission to authority, or without any express or implied consent, would the problem of trespass be present (343 U.S. at 752–753). Clearly, if there be a difference, petitioner's position is less favorable than that of the petitioner in *On Lee,* because Oto was present in petitioner's office by express invitation rather than by implied consent.[2]

There is here no "unauthorized physical encroachment within a constitutionally protected area." *Silverman* v. *United States,* 365 U.S. 505, 510. As the court below said (Pet. App. 4):

> The right which appellant here asserts would seem to be little more than the right to rely upon Oto's apparent inability to produce proof beyond his own testimony of the substance of

[2] The remaining purported distinction—the argument that here as opposed to *On Lee* the evidence was secured after a complaint had been filed against petitioner (Pet. 15)—is without basis either in fact or law. Quite apart from what may have been pending in the present case, the charge of which petitioner was convicted was that of an attempted bribery on or about April 6, 1960 (see indictment, p. 1, R. I), the date on which petitioner was arrested after the last tape had been recorded (R. 281). The indictment was returned on June 15, 1960 (R. I). Moreover, in *On Lee*, the petitioner was at large on bail pending trial when the incriminating statements were made.

> the conversation in which he engaged with appellant. This has little relation to an intrusion upon privacy which is the problem at the heart of the constitutional issues presented by eavesdropping.[*]

2. The case of *On Lee* is likewise dispositive of petitioner's contention (Pet. 19–21) that the agent's failure to have a license as required by Sections 301 and 318 of the Federal Communications Act (*supra*, pp. 2–3) rendered the proof inadmissible. The broad purpose of these licensing sections, as well as that of Section 605 involved in *On Lee*, is to prevent interference with communications. As in *On Lee*, petitioner was not operating a system of communications within the Act (see 343 U.S. at 754). As the court below noted (Pet. App. 6), no federally protected right of petitioner was violated by the agent's lack of an F.C.C. license. No public policy is therefore violated by the admission of the evidence here. See *Nardone* v. *United States*, 302 U.S. 379.

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[*] In its Brief Amicus Curiae, pp. 2–7, the American Civil Liberties Union argues that the rationale of *On Lee* should be reexamined in the light of recent and projected developments in the science of electronics which threaten to invade our right of privacy. The same argument was made in *Silverman* v. *United States*, *supra*, 365 U.S. at 508–509. The Court there answered those arguments as follows (*id.* at 509): "The facts of the present case * * * do not require us to consider the large questions which have been argued. We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society. Nor do the circumstances here make necessary a re-examination of the Court's previous decisions in this area."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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